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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
By: Brad Thies, Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

DUANE M. SIERCKE,

Plaintiff/Appellee,

vs.

ANNALLI S. SIERCKE,
(n/k/a ANALLI SALLA)

Defendant/Appellant.

DOCKET NO. 47196-2019

Kootenai County Docket No. CV2017-1996

APPELLANT'S REPLY

Appeal from the District Court of the First Judicial District for Kootenai County.
Honorable Judge Simpson, District Judge Presiding

K. Jill Bolton ISBN: 5269
BOLTON LAW, PLLC
424 E. Sherman Avenue, Suite 308
Coeur d'Alene, ID 83814
Telephone: (208) 306-3360
Facsimile: (208) 519-3974
Email: reception@kjboltonlaw.com

Attorneys for Defendant/Appellant

Ian Smith ISBN 4696
Attorney at Law
250 Northwest Blvd. Suite 109
Coeur d'Alene, ID 83816
Telephone: (208) 765-4050
Facsimile: (208) 765-9089
Email: IanSmithLaw@gmail.com

Attorneys for Plaintiff/Appellee

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I. Overview of Reply

This appeal concerns the central question of whether a report to law enforcement of domestic violence subjects the reporter to a civil defamation claim or whether such reports are protected by an absolute or qualified privilege.

Whether or not such privilege applies, the appeal raises the question of whether it was appropriate to permit a defamation per se instruction when the underlying criminal allegation complained of was neither alleged, nor charged as a felony.

These issues were put squarely before the trial court and were properly preserved and presented to this Court on appeal. The record of appeal contains everything that is pertinent to that question and Appellee, Duane Siercke's (Siercke) has supplied no basis in law or fact in his Response to suggest the trial court correctly followed the law applicable to the facts of this case. Instead, Siercke makes several claims that are belied by the very record he claims was not sufficient to adequately review this case. Each of those claims will be reviewed in turn.

The appeal concerns important issues of law involving instructions supplied to a jury and the trial court's denial of a motion for a new trial based on those erroneous instructions. This well founded and well pled appeal cannot be said to have been pursued frivolously and Siercke should not be awarded attorney fees.

II. The Record on Appeal is Sufficient for Review

The details of Salla's anticipated appeal issues and the record she stated was necessary to review those issues is set forth in her Second Amended Notice of Appeal, filed with this Court on August 12, 2019. (R. pp. 205-208). Within that notice, Salla requested the following be produced for the appeal record.

1. *The appellant requests the preparation of the following portions of the reporter's transcript in **electronic copy**:*
   a. ***jury instructions given to the jury by the Court March 22, 2019**;*
   b. ***jury instruction conferences between counsel and the court and recorded objections by counsel March 22, 2019**;*
   c. ***the testimony of Analli Salla Siercke (translated portions in English only) March 21, 2019 9:35 a.m. to 9:54 a.m.;***
   d. ***the testimony of Duane M. Siercke March 19, 20, 2019;***
   e. ***the testimony of Deputy Ballman March 18, 2019 1:51 P.M. to 4:33 p.m.;***
2. *The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:*
   a. ***All requested and given jury instructions June 18, 2018 and March 22, 2019;***
   b. ***Defendant's objections to Plaintiff's proposed jury instructions June 20, 2018;***
   c. ***Defendant's motion for a new trial April 22, 2019.***
3. *The appellant requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court:*
   a. ***Defendant's Exhibits B, C, E, G, I, J, K, L All exhibits were stipulated to on March 18, 2019 except for Exhibit C. Exhibit C was admitted on March 20, 2019;***
   b. ***Plaintiff's Exhibits 3, 5, 6, 7, 8 All exhibits were stipulated to on March 18, 2019.***

(R. pp. 206-207).

As can be seen, this request included a request for production of transcripts relating to jury instructions and any conferences of the parties with the Court on jury instructions, the entirety of Siercke's testimony, and all of Siercke and Salla's exhibits relating to Siercke's defamation claims. (Id.) Notably, notwithstanding the request for production of the reporter's transcripts of all jury instruction conferences between counsel and the court, no such transcript was supplied by the Clerk of the Court. Salla presumes this is because no such conferences were held on the record. The Case Summary does not note any minute entries for jury instruction

conferences during the course of the 5-day trial. (R. 13). It is notable, however, that the matter proceeded by audio recording without the benefit of a court reporter. (Id.). Regardless, the record that preserved her objections to the jury instructions and her request for application of the absolute privilege to the statements she made to law enforcement was fully preserved in her written objections to Plaintiff's proposed instructions filed with the trial court before jury instructions were read to the jury. (R. pp. 92-96). To understand the objections, it is necessary to review Siercke's proposed instructions. Those too are part of the record on appeal. (R. pp. 54-91). Salla objected to Siercke's slander per se instruction and raised her claim with regard to that instruction that not only should no such instruction be given but that the claim itself should not go to the jury because of her absolute litigation privilege as follows:

> *Plaintiff's Proposed No. 2, 10, 12- Plaintiff [Siercke] proposes slander per se instructions which are not appropriate under the facts upon which he now proposes to narrowly focus his slander claim. Plaintiff's claim focuses on Defendant's [Salla's] statements to law enforcement and prosecutors in their pursuit of criminal charges against the Plaintiff. The charges were initiated by law enforcement after both parties called 911 on March 7, 2016. Defendant's statements in the context of the domestic violence judicial proceedings are subject to an absolute litigation privilege. See Carpenter v. Grimes Pass Placer Mining Co., 19 Idaho 384, 393-95, 114 P.42, 45- 7 (191 l)("the ends of justice and the public good can be best served by allowing litigants to freely plead any pertinent or material matter in a judicial proceeding ... holding them accountable only for defamatory matter which is neither pertinent nor material to the subject under inquiry ... the question of intent cannot be inquired into or become an issue where the party had a lawful right to plead the matter either as a part of his cause of action or defense.").*

(R. at p. 93). This issue was reiterated for the trial court to review in Salla's motion for a New Trial. (R. 156-164). The trial court went on to recognize this objection in its ruling on Salla's motion for a new trial, holding that: a "litigation privilege" does not apply to Salla's statement's to law enforcement about Siercke's domestic violence. (R. pp. 166, 168-170).

Salla also preserved this issue at the trial level in her written objections to the giving of a

defamation instruction involving only three elements, instead of the six elements set forth in the Idaho Civil Jury Instruction. (R. p. 94). Salla also raised the issue in this appeal (Appellant's Br. pp. 15-16). Siercke's response simply does not address this critical, yet highly deficient instruction supplied by the Court.

Salla also made plain her objection to the defamation per se instruction, including that said instruction was not supported by an underlying felony, but instead a misdemeanor crime of domestic violence. (R. 92, 94, 158). In Salla's motion for a new trial, she reminded the court of her argument on the record relating to the instructions. "At the jury instructions conference,[1] [Salla] reminded the trial court of this important point and cited the court to the recent case of *Irish v. Hall*, 163 Idaho 603, 416 P.3d 975(2018)." (R. 158). She wrote: "that case made clear that to be defamatory per se, the conduct alleged must 'impute conduct constituting a criminal offense chargeable by indictment of by information.' *Id.* at 607, 979." (R. 158). Salla went on in her motion for a new trial to point out that the Court's instruction No. 8 which defined the crime which the evidence elicited at trial was the crime that Salla complained of to law enforcement and which formed the basis of Siercke's defamation claim, was that of misdemeanor domestic battery. (R. 158). Thus, in giving a defamation per se instruction, the trial court ignored its own finding that what Salla alleged was a misdemeanor crime of domestic violence – the very reason the trial court gave instruction No. 8. Salla therefore made clear and established on the record before this Court on appeal that she claimed the defamation per se instruction was given erroneously by the trial court. In ruling on Salla's motion for a new trial, the trial court acknowledged the claim as well. (R. 170-71).

[1] This reference to a jury instructions conference suggests that one did occur. It is not clear from the supplied court record and given that Appellant requested transcripts of such conferences but none was provided whether such a conference occurred on the record, or whether it was not properly recorded since the entirety of the trial was not recorded by an official court reporter.

Siercke's cited authority in his response provides support to Salla's position that she established a sufficient record for review. (Resp. Br. pp. 19-20). *See, Turcott v. Estate of Bates*, 165 Idaho 183, 443 P.3d 197, 203 (Idaho 2019)(holding that in a case where no trial transcripts were supplied, the record was sufficient to review the appeal based on the written memorandum decision and order that was included in the appeal record). Moreover, even where a transcript is not supplied, which is not the case here, when "the crux of the issue on appeal involves a legal determination [the Court will exercise] free review." *Id.* at 203, citing *In re Williamson*, 135 Idaho 452, 454, 19 P.3d 766, 768 (Idaho 2001).

III. Respondent does not challenge Appellant's claim of absolute privilege

In his response, Siercke cites to no cases that actually contradict Salla's appeal, but instead relies on several cases that broadly support Salla's position. (Resp. Br. pp. 6, 7). He submits no authority to contradict Salla's claim of absolute immunity. (Resp. Br. pp. 7-13). Instead, Respondent simply cites to and relies upon the trial court's ruling and reliance upon *Dickinson Frozen Foods, v. Jr. Simplot Co.*, 164 Idaho 669, 434 P.3d 1275 (Idaho 2019). But *Dickinson,* only lends support to Salla's appeal by applying an absolute privilege to an alleged defamatory statement when that statement relates to a judicial proceeding. *Dickinson*, 164 Idaho 669, 681 434 P.3d 1275, 1287. But *Dickinson* did not squarely address the scenario presented in this case and instead it analyzed statements made in an actual civil complaint as being absolutely privileged. *Id.* This case presents an opportunity to dig deeper into the privilege as it relates to the question of statements made to law enforcement and prosecutors in the course of their investigation of crimes. There is ample authority for this Court to extend the absolute litigation privilege or, at a minimum, a qualified privilege to such statements. By relying solely on the trial court's decision which also failed to undertake this analysis, Respondent has failed to provide

any argument or authority for not applying an absolute litigation privilege to Salla's statements in this case. The case for review in this matter involves statements made by Salla against her husband to law enforcement about the domestic violence Siercke had inflicted upon her. Siercke's complaint and the testimony he supplied at trial focused on her report to law enforcement of the domestic violence which he claimed was false. (R. 16-23, 56-64). Thus, Salla presented in her opening brief substantial legal authority, both from other jurisdictions across the country and within the jurisdiction of this court that stand for the proposition that an absolute litigation privilege applies to statements made by private citizens to law enforcement so as to prevent or limit civil claims in defamation arising from such statements. (Appellant's Br., pp. 7-15). She had raised this issue squarely with the trial court and the trial court, like the Respondent, simply ignored this authority. (R. pp. 157, 169-170). Rather than analyzing why, for example the *Borg v Boas* case which held that: "the information given to a prosecutor by a private person for the purpose of initiating a prosecution is protected by the same cloak of immunity and cannot be used as a basis for an action for defamation," (231 F.2d 788, at 794 (9th Cir. 1956)) is distinguishable from the instant case, Respondent simply relies on the trial court's analysis. But that analysis was deficient. "Defendant's argument that the litigation privilege applies, citing to an Idaho case from 1911 and a Ninth Circuit case from 1956 is unavailing in light of *Dickinson.*" (R. p. 170). The trial court appeared to have rested its analysis on the proposition that the privilege applies only to attorneys' statements in litigation. It then appears to recognize that it may apply to more situations by ruling that the privilege does not apply to Salla because her statements "were not made to a prosecutor or other attorney; they were not made during the course of a judicial proceeding even under the *Dickinson* court's broad interpretation of what constitutes a judicial proceeding: they were not made before a court, or before an official clothed

with quasi-judicial powers." (R. p. 169-170). Such a limited interpretation is not supported by the *Dickinson* decision, nor the Ninth Circuit's precedential decision in the *Borg* case, or in any of the numerous examples of persuasive authority supplied by Salla in her opening brief. (App. Br. 7-15). In response to this and all of the authority cited by Salla in her opening brief, Siercke simply provides no contrary authority. Accordingly, this Court should follow the analysis supplied in Salla's opening brief in support of finding that Siercke's defamation claim against Salla should have been stricken by application of her requested absolute litigation privilege.

Statements that form the basis of a complaint to law enforcement and prosecutors should be deemed the first step in a judicial proceeding and such statements should be afforded absolute immunity from a defamation claim by the person against whom such statements were made. See, *Malmin v. Engler*, 124 Idaho 733, 736, (Ct. App. 1993) ("defamatory matter published in the due course of a judicial proceeding, having some reasonable relation to the cause, is absolutely privileged") quoting *Richeson v. Kessler*,73 Idaho 548, 551-52, 255 P.2d 707, 709 (1953), RESTATEMENT (SECOND) OF TORTS § 586 (1977). See also, *Richmond v. Nodlan*, 552 N.W.2d 586 (N.D. 1996)(citizens and law enforcement have a common interest in investigating criminal activity and the discussion of potential suspects of criminal activity is relevant to that common interest).

IV. Respondent does not challenge the application of a qualified privilege

In his response, Siercke suggests that because Salla didn't ask for a qualified privilege, she failed to preserve the matter for review. Siercke ignores Salla's appeal issue relating to the actual jury instruction supplied on his defamation claim. The record undermines this claim and supports a finding that the trial court supplied erroneous jury instructions affecting the substantial rights of Salla.

In response to Siercke's proposed jury instructions (R. pp. 54-91), Salla filed written objections, including the objection to a defamation per se instruction and setting forth her specific request that the trial court, at a minimum, give the stock instruction for defamation. (R. p. 94). Further, Salla specifically argued in her objections that a malice definition be supplied – "that Analli Salla acted with intent to cause injury to Duane Siercke or that her conduct was despicable and was done with a willful and knowing disregard of the rights of Duane Siercke. …". (R. p. 95). The trial court did not give the instructions that Salla requested and gave the instructions over Salla's objections. (R. pp. 116-153). Salla therefore properly preserved her objections for review by this Court.

Whether jury instructions have been correctly given is a question of law. *Ballard v. Kerr*, 160 Idaho 674, 702, 378 P.3d 464, 492 (2016), quoting *Mackay v. Four Rivers Packing Co.*, 151 Idaho 388, 391, 257 P.3d 755, 758 (2011)."When considering whether a jury instruction should or should not have been given, the Court considers 'whether there is evidence at trial to support the instruction, and whether the instruction is a correct statement of the law." *Id.* When error is committed in the giving of a jury instruction, it will be reversible error where "the jury instructions, taken as a whole mislead or prejudice a party." *Mackay*, 151 Idaho at 391, 257 P.3d at 758. A jury instruction is prejudicial when it "could have affected or did affect the outcome of the trial." *Garcia v. Windley*, 144 Idaho 539, 164 P.2d 819 (2007). A new trial should be granted where the party demonstrates that the error affected the jury's conclusion. *Ballard*, 160 Idaho 674, 702, 378 P.3d 464, 492 (2016).

Salla requested the application of a litigation privilege and objected to the form of the trial court's defamation instruction. Over Salla's objection, the trial court instructed the jury that it could find that Salla committed defamation against Siercke based in whole, or in part, on the

evidence they received at trial that Salla told law enforcement that Siercke had battered her, this information resulted in his arrest, this information was relayed to the county prosecuting attorney and resulted in Siercke being charged with misdemeanor domestic violence charges. (R. pp. 16-23, 56-64). To find Salla committed defamation, the jury was only required to find the following according to the trial court's instruction number 13:

> *In order to prove a claim of defamation, the Plaintiff Duane Siercke has the burden of proving each of the following elements:*
>
> *l. The Defendant Analli Siercke, nka: Salla, communicated information concerning the Plaintiff Duane Siercke to others; and*
> *2. The information imputed that Plaintiff Duane Siercke had committed a crime; and*
> *3. The information was false.*

(R. p. 133).

Siercke provides block quotes from *Barlow v. International Harvester Co.*, 95 Idaho 881, 552 P.2d 1102 (Idaho 1974) to address the issue of whether a qualified privilege should apply in this case and suggests again that Salla is only presenting the issue of a qualified privilege for the first time on appeal. Instead of supporting Siercke's position, however, *Barlow* stands for the proposition that whether a privilege applies to a defamation claim is a question of law for the trial court's determination. *Id.*, 95 Idaho 881, 892, 552 P.2d 1102, 1113. Salla asserted that her statements to law enforcement were privileged communications. The trial court not only ignored Salla's claim of absolute privilege in instructing the jury, but it ignored any lesser privilege that it was its place to determine as a matter of law. Thus, just as the Barlow court found, "[t]he court may take the question of malice from the jury only if there is no evidence of malice and the undisputed facts admit only one conclusion." *Id.* Here, however, the trial court instructed the

jury without requiring a finding of malice and therefore, as a matter of law, determined that no form of privilege applied to Salla's statements. This determination must now be reviewed.

Siercke's alternative claim that Salla lost the qualified privilege through express malice ignores that, as per *Barlow* and the other cases he relies upon in his response, the decision as to whether express malice occurred, which would remove her privilege and thereby permit Siercke's defamation claim to be decided by the jury, is a threshold question to be put to the jury by inclusion in the defamation jury instruction. *See, Id.* ("[T]here was competent evidence in the testimony of Pinder and Barlow from which the jury could have inferred that the defamatory statements were published with express malice. Therefore, to take the issue from the jury by means of a directed verdict or judgment notwithstanding the verdict would have been error.") In essence, the Barlow case stands for the proposition that the trial court should not have applied an absolute litigation privilege, but instead a qualified privilege and instructed the jury on express malice. It does not stand for the proposition that no privilege should be applied.

In this case, the trial court erred because it afforded no privilege to Salla's statements to law enforcement and prosecutors. The trial court did not afford her the absolute privilege she requested, or the lesser included qualified privilege to which a jury instruction involving bad faith and malice should have been given. This was an error in law and requires reversal and remand for a new trial.

V. Conclusion

Allowing a private Plaintiff who has been charged with criminal offense after a private citizen has reported their criminal conduct to law enforcement and prosecutors to bring civil defamation claims against the private citizen reporter will have a dramatic chilling effect on the administration of criminal justice in Idaho. This appeal involves an important issue of law that

was put to the trial court and decided improperly. This issue was properly preserved on appeal. This Court should find that a privilege applied to Salla's statements that were the subject of the jury's defamation verdict and that the trial court's failure to apply that privilege was reversable error. For each of these reasons, Respondent's request for attorney fees on appeal must be denied.

Dated this 12th day of May, 2020.

BOLTON LAW, PLLC
Attorney for Defendant/Appellant

/s/ K. Jill Bolton
K. JILL BOLTON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of May, 2020, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Ian Smith
Attorney at Law
250 Northwest Blvd. Suite 109
Coeur d'Alene, ID 83816

[ ] U.S. Mail:
[ ] Facsimile: (208) 765-9089
[ ] Hand Deliver:
[X] E-Serve: IanSmithLaw@gmail.com

/s/ China Cram
China Cram